



July 30, 2002

VIA FACSIMILE

The Honorable Michael K. Powell
Chairman
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: SBC Section 272 Biennial Audit Report
(CC Docket No. 96-150)

Dear Chairman Powell:

The Competitive Telecommunications Association ("CompTel") hereby requests access to the information redacted from the Reports of Independent Accountants on Applying Agreed-Upon Procedures, prepared by Ernst & Young, LLP and filed on December 17, 2001 ("*SBC Section 272 Biennial Audit Report*"). Even though this report was filed with the Federal Communications Commission ("FCC") more than six months ago, and despite the Commission's recent decision requiring Verizon to publicly file its own unredacted Section 272 Biennial Audit Report,¹ the Commission has yet to meaningfully "make such results available for public inspection."² In order to comply with its statutory obligation under Section 272(d)(2) and FCC precedent, the Commission must address SBC's unilateral redaction of certain audit results.³

In sum, the Commission has a ministerial mandate under Section 272(d) to make the results of the *SBC Section 272 Biennial Audit Report* available to the public.⁴ In fact, when faced with Verizon's assertion that the filing requirement in Section 272(d)(2) did

¹ *In the Matter of Accounting Safeguards Under the Telecommunications Act of 1996: Section 272(d) Biennial Audit Procedures*, Memorandum Opinion and Order, CC Docket No. 96-150 (rel. Jan. 10, 2002). ("*Verizon Disclosure Order*")

² 47 U.S.C. § 272(d)(2).

³ AT&T has formally requested access to the unredacted version of the SBC Section 272 Biennial Audit. See Letter from Aryeh S. Friedman, Senior Attorney, AT&T, to Dorothy Attwood, Chief, Common Carrier Bureau, February 12, 2002.

⁴ "Where the duty in a particular situation is so plainly prescribed as to be free from doubt. . . it is regarded as being so far ministerial that its performance may be compelled by mandamus." *Wilbur v. United States*, 281 U.S. 206, 218-219 (1930). See also, *Natl. Treasury Employees Union v. Nixon*, 492 F.2d 587 (D.C. Cir 1974) (Court declared President had a constitutional duty to implement federal pay increase mandated by Congress).

not apply to certain information in the incumbent's own Section 272 Biennial Audit Report, the Commission correctly rejected this argument on the ground that "[a]llowing [R]BOCs to withhold information from the final section 272(d) audit report would prevent parties from exercising their statutory right to comment on the audit results."⁵ CompTel, as an interested member of the public, has a right to this information. CompTel Members are currently suffering harm without access to this information, and, unless the audit results are made public, CompTel, its Members, and other competitive carriers will be further prejudiced in pending Commission rulemaking proceedings regarding the need for special access performance measures and standards⁶ and the continued application of the structural separation, nondiscrimination and reporting requirements in Section 272.⁷ SBC, on the other hand, has no legitimate right, or expectation, that it should be able to withhold the audit results from the public when the availability of this information is compelled by statute and FCC orders. Thus, CompTel asks the Commission to comply with its statutory obligation, and immediately release the full results of the *SBC Section 272 Biennial Audit Report*.

Background

In December 2001, when SBC submitted the "results" of its Section 272 Biennial Audit Report, critical information relating to the apparent violations of various Section 272 requirements had been redacted, limiting the ability of CompTel and its Members to meaningfully evaluate the results of this audit.⁸ This information generally falls into five categories:

- (a) Data regarding SBC's performance toward its own operations, which is needed by the public to evaluate SBC's compliance with Section 272(e)(1)'s nondiscrimination safeguards;⁹
- (b) Data regarding whether SBC's affiliates paid the same amount for exchange access services as unaffiliated carriers;¹⁰
- (c) Data regarding whether SBC's affiliate received goods and services at preferential rates, terms and conditions;¹¹
- (d) Information relating to SBC's compliance with the affiliate transaction rules;¹² and
- (e) Portions of SBC's responses to the independent auditor's findings.

⁵ *Verizon Disclosure Order*, ¶ 8.

⁶ *Performance Measurements and Standards for Interstate Special Access Services*, Notice of Proposed Rulemaking, CC Docket No. 01-321, (rel. Nov. 19, 2001). ("Special Access NPRM")

⁷ *In the Matter of Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements*, Notice of Proposed Rulemaking, WC Docket No. 02-112, (rel. May 24, 2002). ("Section 272(f)(1) Sunset NPRM")

⁸ Interestingly, the Commission has not sought comment on the results of the *SBC Section 272 Biennial Audit Report*. The Commission previously sought comment on Verizon's Section 272 Biennial Audit Report, which was the first such audit to be filed with the Commission.

⁹ *SBC Section 272 Biennial Audit Report*, Attachment A-7.

¹⁰ *Id.*, Table 10.

¹¹ *Id.*, Attachments A-5(a)-(c).

¹² *Id.*, Table 6.

By redacting these results, SBC has undermined the principal benefits of Section 272(d), which are to provide interested parties information concerning a Regional Bell Operating Company's ("RBOC") compliance with other performance obligations imposed by Section 272, and to eliminate the RBOC's ability to engage in discriminatory behavior by making any such behavior transparent to affected parties, including the Commission's own Enforcement Bureau.¹³

The Commission's Failure to Require SBC to File an Unredacted Report Encourages Other RBOCs to Withhold Audit Results From the Public

Most troubling is the fact that the Commission rejected Verizon's request for confidential treatment of similar information earlier this year in the *Verizon Disclosure Order*. In spite of this, the Commission's delayed vigilance in requiring the submission of unredacted reports may be setting a disturbing precedent for future biennial audits pursuant to Section 272(d). The Commission's ambivalence appears to have had the effect of encouraging the RBOCs to hide audit findings behind unfounded claims of confidentiality, rendering the publicly filed reports virtually useless. To wit, Verizon filed its first Section 272 Biennial Audit Report on June 11, 2001.¹⁴ The Commission did not require Verizon to file an unredacted audit report until January 10, 2002.¹⁵ During this six-month period, SBC filed its own heavily redacted Section 272 Biennial Audit Report, which is the subject of this letter. SBC's Section 272 Biennial Audit Report redacts much of the same data that Verizon deleted from its report, despite the fact that the *Verizon Disclosure Order* found that *all* RBOCs, not just Verizon, must publicly file complete audit reports to comply with the plain language of Section 272(d)(2).¹⁶

Once again, the Commission has failed to address an RBOC's redactions for more than six months. Competitors should not need to ask the Commission to comply with the clear-cut requirements in the Act and Commission orders every time an RBOC files an unsupported request for confidentiality, especially when the request is based solely on a fear that the audit results will illustrate discriminatory treatment that might result in litigation or enforcement action.¹⁷ Indeed, through its inaction, the Commission has effectively sanctioned the RBOCs' unilateral redactions to critical information in their

¹³ See, e.g., *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, First Report and Order, CC Docket No. 96-149, (rel. Dec. 24, 1996) ¶¶ 323, 327.

¹⁴ Reports of Independent Accountants on Applying Agreed-Upon Procedures, PricewaterhouseCoopers, LLP, June 11, 2001 and June 18, 2001 (collectively, the "*Verizon Section 272 Biennial Audit Reports*")

¹⁵ *Verizon Disclosure Order*.

¹⁶ *Id.*, ¶ 5.

¹⁷ For example, SBC claims that it should not have to publicly report special access performance data for its affiliate because "meaningless variances due to the large number of orders (or troubles) could have unnecessary negative consequences for SBC and may result in unnecessary and unjustified concern on the part of non-affiliated entities as well as other parties (e.g., regulators)." Comments of SBC Communications, CC Docket No. 96-150, March 19, 2002, Attachment, p. 4. SBC misses the mark. The entire purpose of the public disclosure requirement in Section 272(d)(2) is to permit non-affiliated entities to evaluate SBC's performance and determine whether such variances are in fact meaningless or rather to disclose a pattern of significant discriminatory treatment. If SBC were intended to be the sole arbiter of whether performance disparities were "meaningless," Congress would not have required public disclosure.

Section 272 Biennial Audit Reports, thereby permitting the RBOCs to circumvent the statutory requirements of Section 272(d)(2) and the Commission's own orders.

CompTel and Its Members Are Harmed by Lack of Access to this Data

The Commission is allowing SBC to withhold data that would assist in CompTel's efforts to meaningfully comment in other FCC proceedings. As stated in the *Verizon Disclosure Order*, RBOC redactions "hamper[...] parties' ability to evaluate the scope and seriousness of the facts in the audit report."¹⁸ The Commission's delay in publicly disclosing a complete *SBC Section 272 Biennial Audit Report* has materially prejudiced CompTel and its Members in the *Special Access NPRM*. In the *Special Access NPRM*, the Commission asked the threshold question of "whether adoption of measurements and standards for special access services would assist the Commission in ensuring that these services are provisioned in a just, reasonable, and nondiscriminatory manner."¹⁹ The *Special Access NPRM* even cites Section 272(e)(1) as a possible basis of jurisdiction from which to impose national performance measures.²⁰ By allowing SBC to withhold existing performance data that may demonstrate the existence and magnitude of discrimination in its provision of special access services, the Commission has placed CompTel and its Members at a procedural disadvantage in this proceeding. In fact, CompTel and its Members were unable to inform their January 22 comments and February 12 reply comments in this docket based on the Commission's failure to address this issue.

Further, as discussed in my January 3 letter to you concerning Verizon's Section 272 Biennial Audit Report,²¹ allowing an RBOC to hide special access performance data from its Section 272 Biennial Report could undermine future efforts to require the incumbent carriers to report their special access performance. SBC could use the precedent established in this proceeding to justify confidential treatment of the performance results generated by any national special access performance measures, once implemented. National performance measures will be useless if carriers and all other interested parties do not have access to RBOC results.

The Commission's failure to require SBC to file an unredacted Section 272 Biennial Audit Report also has materially impaired the ability of CompTel and its members to file comments in the Commission's pending rulemaking concerning the sunset of the structural separation, nondiscrimination and reporting requirements in Section 272.²² The Commission's *Section 272(f)(1) Sunset NPRM* specifically asks, "To the extent that commenters recommend that the Commission consider [R]BOCs' actual behavior in terms of cost misallocation and other discriminations, *what evidence is there of such behavior and on what evidence should the Commission rely?*"²³ As stated in

¹⁸ *Verizon Disclosure Order*, ¶ 8.

¹⁹ *Special Access NPRM*, ¶ 1.

²⁰ *Id.*, ¶ 10.

²¹ Letter from H. Russell Frisby, Jr., President, CompTel, to Michael K. Powell, Chairman, Federal Communications Commission, January 3, 2002.

²² Sections 272(a),(b),(c),(d) and (e)(2) and (e)(4).

²³ *Section 272(f)(1) Sunset NPRM*, ¶ 15. (emphasis added)

CompTel's recent request for an extension of the filing deadlines in this rulemaking,²⁴ CompTel will not have access to all available evidence that could support a more complete response to the Commission's questions without the ability to review *SBC's Section 272(d) Biennial Audit Report*.

In fact, CompTel and its Members are perplexed by the Wireline Competition Bureau's recent Order rejecting CompTel's request for an extension of the filing deadline in the *Section 272(f)(1) Sunset NPRM*.²⁵ Specifically, CompTel asked the Commission to extend the filing deadline until two weeks after SBC files a complete *Section 272 Biennial Audit Report*, due to the impairment caused by our inability to review complete audit results. The Bureau rejected CompTel's request and granted a two-week extension instead based on "the need to develop a record in this proceeding in advance of the statutory sunset date."²⁶ The Commission's commitment to address the elimination of the Section 272 Safeguards within the next five months²⁷ is troubling, given its apparent unwillingness to address the simple confidentiality issues raised by the *SBC Section 272 Biennial Audit Report* over the past six months. More troubling is the Commission's apparent unwillingness to comply with its own statutory obligation to disclose audit results.

* * *

In conclusion, CompTel has waited patiently for the FCC to take appropriate steps to enforce the provisions of Section 272(d)(2) of the Act. However, the Commission's failure to provide CompTel and its Members access to complete versions of the *SBC Section 272 Biennial Audit Report* undermines our ability to demonstrate the need for national special access performance measurements and a continuation of the post-Section 271 entry safeguards in Section 272. Additionally, it has frustrated the ability of our Members, negatively affected by SBC's performance, to obtain legal redress expeditiously. Further, the Commission's continuing reluctance to compel access to statutorily mandated public information also has established an unfortunate precedent that will encourage other RBOCs to take Verizon's lead and submit Section 272 Biennial Audit Reports with dramatic, unjustified redactions.

For the foregoing reasons, I urge the Commission to take the steps outlined in AT&T's February 12 letter, and make available to the public a complete version of the *SBC Section 272 Biennial Audit Report* as soon as possible.

²⁴ *Id.*, Request for Extension of Comment Period, July 15, 2002.

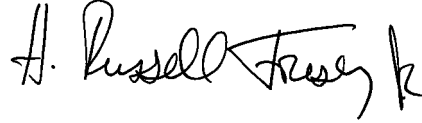
²⁵ *Id.*, Order, DA 02-1741 (WCB rel. July 18, 2002).

²⁶ *Id.*

²⁷ Under Section 272(f)(1), the provisions of Section 272(a), (b), (c) and (e)(2) and (e)(4) will sunset in the State of New York in December 2002 absent Commission action.

Please contact me if you would like to discuss this matter further.

Sincerely,

A handwritten signature in black ink, appearing to read "H. Russell Frisby, Jr." with a stylized flourish at the end.

H. Russell Frisby, Jr.
President

cc: Commissioner Kathleen Q. Abernathy
Commissioner Michael J. Copps
Commissioner Kevin J. Martin
Ms. Marsha MacBride
Ms. Jane Mago
Mr. Richard Lerner
Mr. Christopher Libertelli
Mr. Matthew Brill
Mr. Jordan Goldstein
Mr. Dan Gonzalez